FILED

JUN 18 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

Rojas-Castro v. INS
No. 01-70668

RAWLINSON, Circuit Judge, Dissenting

I respectfully dissent. Although the majority's disposition acknowledges that this case is governed by the BIA's decision in Matter of Gutierrez, 19 I & N Dec. 562 (1988), the majority's rationale strays far from that ruling. In Gutierrez, the BIA expressly cautioned that determination of whether to allow an alien in exclusion proceedings to withdraw her application for admission, should not be made by weighing the equities involved. *Id.* at 564*; See* also *Sharma v. Reno,* 902 F. Supp. 1130, 1139 (N.D. Cal. 1995). However, the majority disposition does exactly that by articulating "factors of admissibility which weigh heavily in Rojas-Castro's favor."

The proper focus on appeal is whether Rojas-Castro established that she possessed the intent and means to depart immediately and that her exclusion would not serve the interests of justice. See *Gutierrez,*19 I & N at 564-65; see also *Sharma,* 902 F. Supp. at 1139. Rojas-Castro made no such showing.

The majority accuses the IJ of declining to take testimony from Rojas-Castro as to her means and intent to depart. In fact, the record reflects that Rojas-Castro never intended to depart the United States. Rojas-Castro's counsel

specifically indicated to the court that Rojas-Castro's intent in attempting to withdraw her application was to remain in the United States while she pursued her adjustment of status. (Administrative Record at 80-81, 98). Therefore, the rejected testimony was not as to Rojas-Castro's intent to depart, but an attempt to explain the circumstances under which she was discovered attempting to reenter the United States without proper entry documents (Administrative Record at 107, 109). The proffered testimony was already a matter of record, having been explored thoroughly at Rojas-Castro's criminal trial, where she was convicted of illegal entry (Administrative Record at 37, 77-78, 107).

We must keep in mind the BIA's caution "that it was never contemplated that the withdrawal of an application for admission would become a nonstatutory form of 'relief' from excludability which an applicant could apply for after excludability became apparent." *Gutierrez,* 19 I & N at 565. With that stricture in mind and in light of Rojas- Castro's evidentiary failing, I find no abuse of discretion on the part of the IBA. *See Sharma,* 902 F. Supp. at 1140 (applying an abuse of discretion standard).